

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 19TH JUNE 2007 / 29TH JYAISHTA 1929

SA.No. 855 of 1993()

FROM DECREE AND JUDGMENT DATED 27.2.93 IN A.S.NO.20/92 OF IIND
ADDITIONAL SUB COURT, ERNAKULAM FROM JUDGMENT AND DECREE DATED
8/7/91 IN O.S.NO.156/71 OF IIND ADDL.MUNSIFF'S COURT, ERNAKULAM
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APPELLANTS/APPELLANTS/DEFENDANTS:

1. AYYAPPAN KUMARAN, MANCHOTTIL, KANAYANNOOR
DESOM, DO VILLAGE. (* DIED. LRS IMPEADED)

2. KUNJUPENNU, W/O. AYYAPPAN KUMARAN,
KANAYANNOOR DESOM, DO VILLAGE.

(* ADDL. APPELLANTS)

3. KAUSALLIYA, D/o. LATE AYYAPPAN, AGED 49,
KUNNELIKUZHAYIL DO. DO.

4. SAROJINI, D/O LATE AYYAPPAN, AGED 45 YEARS,
ARIPARAYIL HOUSE, KANINADU KARA,
PUTHENCROUZ VILLAGE, KUNNATHUNADU TALUK.

5. SASI, S/O.LATE AYYAPPAN, AGED 41 YEARS,
MANCHOTTIL KANAYANNUR VILLAGE.

6. RAVINDRAN, S/o. LATE AYYAPPAN, AGED 34 YEARS
DO. DO.

(* ADDL. APPELLANTS 3 TO 6 ARE IMPEADED AS THE L.R.S. OF THE
DECEASED IST APPELLANT AND APPELLANT NO.2 IS ALSO RECORDED AS THE
L.R. OF THE DECEASED IST APPELLANT AS PER ORDER DT.8/4/02 ON
C.M.P.No.629/02)

BY ADV. SRI.V.V.ASOKAN
SMT.S.AMINA

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

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1. MARY ALIAS BABY, D/o. LATE CHERIAN,
PARAKULANGARA, KANAYANNOOR VILLAGE, DO DESOM.
 2. AMMINI W/o. LATE VARKEY, DO HOUSE, DO VILLAGE
DO DESOM.
 3. P.V.ALIAS, AGED 19 YEARS S/O. VARKEY, DO HOUSE,
DO VILLAGE, DO DESOM.
 4. P.V.ELMY AGED 19 YEARS D/o. LATE VARKEY DO HOUSE,
DO VILLAGE, DO DESOM.

BY ADV. SRI M RAVIKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19/06/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A. NO. 855 OF 1993

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Dated this the 19th day of June, 2007

JUDGMENT

Defendants in O.S.156/1971 on the file of II Additional Munsiff Court, Ernakulam are the appellants. Respondents are the plaintiffs. On the death of the first appellant, additional appellants 3 to 6 were impleaded as his legal heirs. Respondents instituted the suit seeking a decree for permanent prohibitory injunction and recovery of possession on the strength of title. The plaint A schedule property consists of two items. Item No.1 is 1 acre 12 cents in survey No.46/1 and second item 4 acre 13 cents in survey No.445 and 67. Plaint B schedule property is the building in item No.1 of the plaint A schedule property. Plaint schedule property admittedly originally belonged to Pallippurath Pazhoor Mana. According to respondents-plaintiffs, plaint A schedule properties were originally obtained by

Kochunny and his brother as per a lease from the Mana and thereafter it was mortgaged under Ext.A6 in favour of Varkey Thomman and the mortgagees right was purchased by Varkey Thomman and thereafter equity of redemption Kochunni was also purchased under Ext.A5 and on the death of Varkey Thomman, his rights devolved on Cheruchi and Varkey Thomman under Ext.A11. Thereafter it was mortgaged in favour of Meenakshy and for realisation of the mortgage money, properties covered under Ext.A11 were sold in court auction in execution of the decree in O.S.48/1103 M.E and the properties were purchased by Govinda Menon thereafter under Ext.A7 sale deed, it was purchased by Annam and on the death of Annam her rights devolved on respondents. It was also contended that a portion of item No.1 of the plaint schedule properties was obtained by Kunjappi under Ext.B12 lease and after the death of Kunjappi it devolved on Kali and under Ext.A12 that right was also purchased by respondents and thus the

respondents have title to item Nos. 1 and 2 of plaint A schedule properties. Respondents are tracing out title to item No.1 of the plaint schedule property partly under Ext.A7 and partly under Ext.A12. According to them, respective portions were obtained under Ext.A7 and A12. Title of item No.2 of the property was traced under Ext.A7 the court auction sale of the mortgage right under Ext.A2 and A3. Respondents in the written statement contended that the description of the plaint schedule properties is not correct and respondents have no title to item No.1 of the plaint schedule property. Though title to item No.2 of the plaint schedule property as such was not disputed, it was contended that the property as described also included their property and therefore respondents have no title to item No.2 of the plaint schedule properties also. According to appellants, item No.1 of the plaint A schedule property comprised in survey No.46 is known as Karavattu Chittathu Parambu and it was obtained by

Kunjappi under Ext.B12 and on the death of Kunjappi it devolved on Kali and thereafter appellants are in possession of the property and therefore respondents have no right over the same. Appellants also contended that 42 cents of the property in survey No.445/3 was obtained by Kunjappi under registered lease deed 887/1081 M.E. which subsequently devolved on Kali and she renewed the lease under Ext.B16 and thereafter her right was obtained by Ayyappan and under Ext.B17 Will he bequeathed the property in favour of his wife and children and the other legatees under the Will assigned their right under Ext.B19 and Ext.B20 in favour of first appellant who later purchased the jenm right from the Land Tribunal and obtained Ext.B23 purchase certificate. It was therefore contended that respondents have no right to recover possession of the properties and they are not entitled to the decree sought for.

2. Learned Munsiff after recording the evidence originally granted a decree for permanent

prohibitory injunction in respect of the plaint A schedule properties but disallowed the claim for recovery of possession of Plaint B schedule property. The decree and judgment were challenged by both the plaintiffs and defendants before Sub Court, Ernakulam in A.S.No.101/1980 and A.S.103/1980. Learned Sub Judge as per judgment dated 13.11.1983 set aside the original decree and judgment and remanded the suit back to the trial court with a direction to get the properties identified that the properties were not correctly identified by the Commissioner. Thereafter DW3 was appointed the Commissioner and Commissioner with the assistance of DW2 the Surveyor identified the property and submitted Exts.C2 report and Ext.C2(a) plan. Learned Munsiff on the evidence of Pws.1 to 3, Dws.1 to 5, Exts.A1 to A14, Exts.B1 to B26, Exts.C1 and C2 held that plaint schedule properties are correctly identified and demarcated by the Commissioner in Exts.C2(a) plan. Learned Munsiff also found that under Ext.A7 and A12

respondents have title to the plaint A schedule properties and appellants have no title to the disputed portion of the plaint schedule properties. Learned Munsiff therefore granted a decree for permanent prohibitory injunction in respect of the plaint A schedule properties and a decree for recovery of possession of plaint B schedule property on the strength of title. Defendants challenged the decree and judgment before Additional Sub Court, Ernakulam in A.S.20/1992. Learned Sub Judge on reappreciation of evidence, confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in this second appeal.

3. When the appeal came up for admission, respondents who had lodged a caveat appeared. Though records were called from the courts below, substantial questions of law were not formulated.

4. Learned counsel appearing for appellants and respondents were heard.

5. The learned counsel appearing for

appellants vehemently argued that courts below did not consider the evidence on the identification of the properties. It was argued that as per the original remand order passed by the first appellate court, trial court was directed to get the plaint schedule properties identified and Ext.C2 report and C2(a) plan with the evidence of Dws 2 and 3 establish that plaint schedule properties were not properly identified and therefore the decree granted cannot be sustained. It was also argued that when the suit is filed seeking a decree for recovery of possession on the strength of title, burden is on the plaintiffs to establish their title and the identity of the plaint schedule properties and that burden cannot be shifted on the appellants and either for the reason that appellants did not establish their title or that there is weakness in their case, a decree cannot be granted in favour of the respondents and as respondents failed to establish the identity of the plaint schedule properties and therefore the title

to the plaint schedule properties, the decree granted are to be set aside. Learned counsel appearing for respondents argued that after the order of remand by the first appellate court, a Commissioner was appointed and DW3, the Commissioner along with DW2, Surveyor identified the property with the documents and the Commissioner submitted Ext.C2 report and C2(a) plan and the Surveyor was also examined and on that evidence, trial court entered a factual finding that the plaint schedule properties were identified properly and respondents have title to the plaint schedule properties and that factual finding was confirmed by the first appellate court on reappreciation of evidence and this court cannot act as a third tier of fact finding authority and reappreciate the evidence and in any case there is no substantial question of law involved in the appeal and therefore the appeal is only to be dismissed.

6. On hearing learned counsel appearing for

appellants and respondents, I do not find any substantial question of law involved in the appeal. Appellants are tracing out their title to item No.1 of the plaint A schedule properties partly under Ext.A7 and partly under Ext.A12. The right obtained under Ext.A7 is the right obtained by Govinda Menon in court action sale in execution of the decree in O.S.48/1103 for realisation of the amount due under Ext.A2 and A3 mortgage. Learned Munsiff and the learned Sub Judge on appreciation of evidence found that respondents have title to item No.1 of the plaint schedule property under Exts.A7 and A12. The right obtained under Ext.A12 is the very same right relied on by the appellants namely the right obtained by Kunjappi under Ext.B12. Though it was argued under Ext.A12 respondents did not derive any title, Ext.A12 establish that the right obtained by Kunjappi under Ext.B12 which devolved on Kali and thereafter on Cheruchi was transferred under Ext.A12. When the right under Ext.B12 was trnasferred under Ext.A12,

and the property vests with the respondents, appellants are not entitled to claim that they have right title to item No.1 of the plaint schedule properties under Ext.B12. As rightly found by the courts below, respondents have title to item No.1 of the plaint schedule properties partly under Ext.A7 and partly under Ext.A12.

7. Similarly with regard to item No.2 of the plaint schedule property the written statement itself discloses that appellants are admitting the title. What was contended in the written statement was that 4 acre 13 cents claimed by respondents in survey No.45 and 67 is not the disputed property but another property. They have no case that respondents did not derive title to item No.2 of the plaint schedule property obtained under Ext.A7. Instead the dispute was only with regard to the identity of the properties. Courts below on the evidence found that item No.2 of plaint schedule property is correctly identified in Ext.C2 and C2 (a) and respondents have title to the item No.2 of

plaint A schedule property under Ext.A7.

8. Then the question is on the identity of the properties. Though learned counsel appearing for appellants vehemently argued that courts below did not correctly identify the property, when DW3 the Commissioner and DW2 the Surveyor were examined there was no serious and searching cross examination with regard to the correctness of the identification. The trial court and the first appellate court on the evidence accepted the identification made by the Commissioner and granted the decree. I do not find that it is for this court to consider the identity once again on reappraisal of evidence. The powers of this court under section 100 of the Code of Civil Procedure cannot be invoked for that purpose. In any event, it is not a substantial question of law. Therefore appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.855 /1993

JUDGMENT

19th JUNE,2006